J. A52032/91

COMMONWEALTH OF PENNA., Appellant	:	IN THE SUPERIOR COURT OF PENNA.
VS.	:	
GEORGE HOWARD CLARK	:	NO. 01485 PHILA. 1991

JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Delaware County be, and the same is hereby AFFIRMED.

By the Court:

David A. Szewczak
Prothonotary

Dated: JANUARY 6, 1992

APPENDIX "A"

J. A52032/91

COMMONWEALTH OF PENNA., Appellant	:	IN THE SUPERIOR COURT OF PENNA.
VS.	:	
GEORGE HOWARD CLARK	:	NO. 01485 PHILA. 1991

Appeal from the Order dated April 10, 1991 in the Court of Common Pleas of Delaware County, Criminal Division, at No. 5577 of 1990

BEFORE: CAVANAUGH, POPOVICH, AND HOFFMAN, JJ.

OPINION BY HOFFMAN, J.: Filed: Jan. 6, 1992

This is an appeal by the Commonwealth from an order dated April 10, 1991 granting appellee's omnibus pretrial motion. On appeal, the Commonwealth contends that the suppression court erred by suppressing the evidence seized pursuant to a search warrant. For the following reasons, we affirm the suppression order.

On June 15, 1990, two Chester Police officers from the narcotics and vice division appeared before a District Justice. They presented an affidavit which recited, inter alia, that a confidential informant (CI) had

witnessed appellee within the previous forty-eight hours take orders for cocaine at a housing project where appellee was allegedly selling drugs. The CI observed appellee drive to his residence in a 1970's Pontiac Ventura, get out, enter his house, and return to his vehicle within a couple of minutes with a controlled substance. The search warrant revealed that this CI was reliable in that the CI had provided information about other individuals in the past, which resulted in arrests. A search warrant was issued and executed the same day. A search of appellee's bedroom yielded a white powdery substance, numerous small plastic bags, and a thirty-eight caliber handgun. Appellee was subsequently charged with possession of a controlled substance,[1] possession of a

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[1] 35 Pa. C.S.A. § 780-113 (a) (16).

controlled substance with intent to deliver[2] and possession of drug paraphernalia.[3]

Appellee filed an omnibus pretrial motion seeking, inter alia, to suppress the evidence seized pursuant to the search warrant. A hearing was held on this motion on November 16, 1990. At the hearing, appellee produced a receipt from an auto service station for work done for George Clark, appellee herein, on a 1977 Pontiac on June 12, 1990. The receipt indicated that the car was to be picked up on June 16 and that, in fact, payment in full was made on June 16 when the car was picked up by appellee's father. This evidence contradicts the statement in the affidavit supporting the search warrant that the CI observed appellee forty-eight hours prior to the execution of the search warrant. Moreover, appellee and

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[2] 35 Pa. C.S.A. § 780-113 (a) (16).

[3] 35 Pa. C.S.A. §780-113 (a) (32).

appellee's father both testified that appellee did not drive the car at all during the first two weeks of June, again in contradiction to the CI's statements in the affidavit. The suppression court granted appellee's motion to suppress the evidence on April 10, 1991. This timely appeal followed.[4]

The Commonwealth contends that the court improperly suppressed the evidence seized during the execution of the search warrant. When the Commonwealth appeals the adverse decision of a suppression court, we must consider only the evidence of the defendant's witnesses and so much of the evidence for the prosecution as read in the context of the record as a whole that remains

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[4] We note that the Commonwealth has certified that suppression of the evidence would substantially impair its prosecution of appellee. See Appellant's Brief at 1. We will, therefore, entertain its appeal. See Commonwealth v. Duggar, 506 Pa. 537, 546-47, 486 A.2d 382, 386 (1985).

uncontradicted. Commonwealth v. Hamlin, 503 Pa. 210, 215-16, 469 A.2d 137, 139 (1983) (plurality opinion) (citing Commonwealth v. Goodwin, 460 Pa. 516, 522-23, 333 A.2d 892, 895 (1975)).

Both the United States Constitution and the Pennsylvania Constitution prohibit unreasonable searches and seizures. See U.S. Const. Amendment IV; Pa. Const. Art. I, §8. The starting point in determining whether a search and seizure conducted pursuant to a search warrant was unreasonable is to question whether probable cause existed to issue the search warrant. See Pa.R.Crim.P. 2003 (a) ("[n]o search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority"); see also Commonwealth v. Jones, 506 Pa. 262, 269, 484 A.2d 1383, 1387 (1984) ("[b]efore an issuing authority may issue a constitutionally valid search warrant he or she must be furnished with information

sufficient to persuade a reasonable person that probable cause exists to conduct a search") (citations omitted).

In 1985, our Supreme Court followed the United States Supreme Court in adopting a totality-of-the-circumstances analysis to determine if probable cause exists to support a search warrant. In Commonwealth v. Gray, 509 Pa. 476, 503 A.2d 921 (1985), the Pennsylvania Supreme Court stated:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Gray, 509 Pa. at 484, 503 A.2d at 925 (citation omitted). However, if a search warrant is based on an affidavit containing deliberate or knowing misstatements of material fact, the search warrant is invalid. See Commonwealth v. Bonasorte, 337 Pa.Super.

332, 347, 486 A.2d 1361, 1369 (1984) (misstatement of police officer); see also Commonwealth v. D'Angelo, 437 Pa. 331, 337, 263 A.2d 441, 444 (1970) (misstatement of police officer). Cf. Commonwealth v. Bradshaw, 290 Pa.Super. 162, 165, 434 A.2d 181, 182 (1981) (court recognized that material misstatements by confidential informant invalidate search warrant).[5]

"A material fact is one without which probable cause to search would not exist." Commonwealth v. Tucker, 252 Pa.Super. 594, 599, 384 A.2d 938, 941 (1978) (citation omitted). An affidavit underlying a search warrant must set forth a concrete time frame in which the confidential informant observed the alleged criminal activity forming the

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[5] The Bradshaw court did not, however invalidate the search warrant based on material misstatements because of the good faith exception to the exclusionary rule. This exception has since been rejected by our Supreme Court. see infra page 7 for discussion of Commonwealth v. Edmunds.

basis for his tip. Cf. Commonwealth v. Edmunds, 526 Pa. 374, 382, 586 A.2d 887, 890-91 (1991) (search warrant was facially invalid because it did not reference time that informant observed activity).

In the instant case, the affidavit supporting the search warrant stated:

> Within the past two weeks the affiant listed on the face sheet of this warrant did speak with the confidential reliable informant also listed on the face sheet of this warrant on several occasions.... The CI stated that he has observed George Clark deliver cocaine on the east side of the city and in the Lamokin Village housing project on several occasions.... The CI stated that Clark delivers the cocaine in a 1970's Pontiac Ventura Dark Gray in color with a burgundy rag top.... The CI stated that he has over heard [sic] Clark take orders from other individuals for cocaine, when Clark has stated that he would go and get the caine [sic]. The CI has followed Clark to 76 West 8th Street where Clark resides. He would enter the house and then return to his vehicle within a couple of minutes with the controlled substance. The CI saw the cocaine in George Clarks [sic] hands.
> The CI saw this in the past 48 hrs.

Commonwealth Exhibit 1 (emphasis added). Thus, the affidavit references concrete time frames of two weeks and forty-eight hours. However, the time references are not factually correct.

The instant affidavit was sworn on June 15, 1990. At the suppression hearing, appellee introduced a receipt from McCauls Auto Service, which established that appellee's car was in the shop for repairs from June 12-16, 1990. Furthermore, appellee and his father both testified that on the Memorial Day weekend about two weeks before the instant search warrant was issued, appellee was stopped twice while driving to work for driving with a suspended license. After the second stop, appellee's father took the keys away from him, and removed the tags and license plate from the car. Both parties testified that appellee did not drive the car at all during the first two weeks of June. See N.T. November 16, 1990, at 14-17, 25, 31-

32. Because of this evidence and testimony, it is apparent that the information provided by the CI with respect to the time frame was inaccurate, and a necessary element of the search warrant affidavit is missing. Moreover, because it would have been impossible for the CI to observe appellee engaging in the conduct described at the time indicated, we can infer that this misstatement was knowingly made. Hence, the search warrant at issue was invalid, because it was based on an affidavit lacking in probable cause.

Nonetheless, appellant argues that Pennsylvania law does not permit an attack on the veracity of the confidential informant, because of the good faith exception to the exclusionary rule[6] applied by this court in

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[6] The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Leon, 468 U.S. 897, 906, 104 S.Ct. 3405, 3412 (1984) (citing United States v. Calandra, 414 U.S.

Commonwealth v. Bradshaw, 290 Pa.Super. 162, 165, 434 A.2d 181, 182 (1981).[7] However, appellant's reliance on Bradshaw is misplaced. Our Supreme Court has recently held that Article I, Section 8 of the Pennsylvania Constitution does not incorporate a good faith exception to the exclusionary rule. Commonwealth v. Edmunds, 526 Pa. 374, 382, 586 A.2d 887, 891-92 (1991). The court carefully examined the

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338, 348, 94 S.Ct. 613, 620 (1074)), reh'g denied, 468 U.S. 1250, 105 S.Ct. 52 (1984). The rule's practical effect is to exclude evidence seized in violation of the Fourth Amendment. Pennsylvania did not adopt the exclusionary rule until Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961). In Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963), cert denied, 375 U.S. 910, 84 S.Ct. 204 (1963), our Supreme Court interpreted Mapp as requiring the exclusion of unlawfully seized evidence. Id. at 64, 190 A.2d at 309.

[7] The Bradshaw court held that although the affidavit supporting the search warrant was based on deliberate misstatements by a CI, it was not necessary to suppress the evidence because the police officer reasonably believed and relied on the statements in the facially valid search warrant. Bradshaw, 290 Pa.Super. at 166-67, 434 A.2d at 183.

principles underlying the exclusionary rule, as well as the history of Article 1', Section 8, and concluded that the rule's purpose was much broader than the analogous federal provision.

Justice Cappy, writing for the majority, noted that while the United States Supreme Court, in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984) reh'g denied, 468 U.S. 1250, 105 S.Ct. 52 (1984), was able to find that a good faith exception would not deviate from the Fourth Amendment's purpose to deter willful police misconduct, the same analysis could not be applied to the Pennsylvania provision:

> the exclusionary rule in Pennsylvania has consistently served to bolster the twin aims of Article I, Section 8; to-wit, the safeguarding of privacy and the fundamental requirement that warrants shall only be issued upon probable cause. Commonwealth v. Melilli, [521 Pa. 46, 470 A.2d 457 (1983)]. As this Court explained in Commonwealth v. Miller:

> The linch-pin that has been developed to determine whether it is appropriate to issue a search warrant is the test of probable cause. Commonwealth v. Chandler, [505 Pa. 113, 477 A.2d 851], supra. It is designed to protect us from unwarranted and even vindictive incursions upon our privacy. It insulates from dictatorial and tyrannical rule by the state, and preserves the concept of democracy that assures the freedom of its citizens. This concept is second to none in its importance in delineating the dignity of the individual living in a free society.

Edmunds, supra., 526 Pa. at 398, 586 A.2d at 899 (citing Commonwealth v. Miller, 513 Pa. 118, 127, 518 A.2d 1187, 1191-92 (1986)). In light of this history and purpose, the court concluded that to adopt a good faith exception to the exclusionary rule would "virtually emasculate those clear safeguards which have been carefully developed under the Pennsylvania Constitution over the past 200 years." Edmunds, supra, 526 Pa. at 399, 586 A.2d at 899. Consequently, Edmunds requires us to suppress the evidence seized under the

instant invalid search warrant, notwithstanding the good faith with which the officer may have relied on the CI's information.[8] Accordingly, we affirm the order of the suppression court.

Order affirmed.

CAVANAUGH, J. files a Concurring Opinion

POPOVICH, J. concurs in the result.

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[8] We recognized that the instant search warrant was issued in 1990, before Edmunds was decided. However, in Commonwealth v. Farrington, ___Pa.___, 595 A.2d 1146 (1991), our Supreme Court vacated a Superior Court Memorandum decision applying the good faith exception where evidence was seized pursuant to an invalid search warrant issued in 1988. The Supreme Court remanded for reconsideration in light of Edmunds. Because the Supreme Court has thus indicated that its unequivocal rejection of the good faith doctrine applies to search warrants issued prior to Edmunds, we are bound to follow it here. In so doing, we are also guided by similar applications of Edmunds by other panels of this court. See Commonwealth v. Bagley, ___Pa.Super.___, 596 A.2d 811, 816 (1991) (police not entitled to invoke good faith exception for evidence seized pursuant to 1989 search warrant); Commonwealth v. Grubb, ___Pa.Super.___, 595 A.2d 133, 136 (1991) (court bound to follow Edmunds in rejecting good faith doctrine).

J. A52032/91

COMMONWEALTH OF PENNA., Appellant	:	IN THE SUPERIOR COURT OF PENNA.
VS.	:	
GEORGE HOWARD CLARK	:	NO. 01485 PHILA. 1991

Appeal From the Order Dated April 10, 1991 in the Court of Common Pleas of Delaware County, Criminal Division, at No. 5577 of 1990.

BEFORE: CAVANAUGH, POPOVICH, and HOFFMAN, JJ.

CONCURRING OPINION BY CAVANAUGH, J.:

Filed: Jan. 6, 1992

I join with the majority opinion since I agree with Judge Prescott of the suppression court that as required by law, the police failed to undertake an independent investigation after receiving the statement from the confidential informant.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMM. OF PENNA	:	NO. 5577
VS.	:	
GEORGE CLARK	:	OF 1990

Thomas Lawrie, Esq, Assistant District Attorney
Attorney for the Commonwealth

Douglas L. Smith, Esq. Attorney for Defendant
30 W. 3rd Street, Media, PA 19063

PRESCOTT, J. FILED: 6-4-91

OPINION

The Commonwealth has appealed this Court's Order of April 10, 1991 granting an Omnibus Pre-Trial Motion of Defendant, Howard Clark, hereinafter Clark. The Motion was argued before this Court on November 16, 1990 raising issues concerning the propriety of reliance by the Chester Police Department on information contained in the affidavit of probable cause. Incorrect statements made by a confidential informant formed the basis for

execution of a search warrant where Clark resided. The Court granted the Motion and suppressed all evidence seized during the course of Clark's arrest.

Viewing the evidence in a light most favorable to the Commonwealth as non-moving party, the following facts were established: On June 15, 1990 Chester Police Officer John Kaisner and Sergeant John Finnegan of the narcotics and vice division appeared before District Justice Collins and swore to and signed a search warrant for the residence located at 76 West 8th Street, Chester, Pennsylvania and for Clark.

The Affidavit of Probable Cause was based on the testimony of a confidential informant, hereinafter CI. The CI stated that Clark had been selling both large and small amounts of cocaine in and around the Lamokin Village Housing Project. Clark allegedly had been distributing drugs from a 1970's Pontiac Ventura which was parked in

front of the residence. The CI stated:

> The CI has followed Clark to 76 West 8th Street where Clark resides. He would enter the house and then return to his vehicle within a couple of minutes with the controlled substance. The CI saw the cocaine in George Clark's hands. The CI saw this in the past 48 hours.
> Commonwealth's Exhibit 1.

The Chester police did not confirm the observed activities by an independent investigation. A search warrant was issued and members of the Chester Police Narcotics Unit went to Clark's residence. After knocking and hearing no response, the police entered through the unlocked front door. Clark was observed coming down the second floor staircase and detained. The house was secured and a minor female was found in a second floor bedroom. A subsequent search of the bedroom belonging to Clark yielded a white power substance, numerous small, plastic bags and a chrome plated 38 cal.

handgun. Clark was arrested and charged with Possession and Possession with Intent to Deliver 43.1 grams cocaine, 35 Pa.C.S. 780-113 (a) (16), (b) through (f) and Possession of Drug Paraphernalia, 35 Pa.C.S. 780, 113 (a) 732.

Clark filed an Omnibus Pre-Trial Motion seeking discovery of the Commonwealth's files and suppression of the evidence. When argument was heard on November 18, 1990, the Discovery Motion had been satisfied by the Assistant District Attorney for the Commonwealth.

In Clarks Suppression Motion, defense counsel stated that the Chester police relied upon the testimony of the CI without any corroborating evidence.

Defense also argued that the affidavit of the CI was inaccurate regarding drug sales by Clark two weeks prior to his arrest. The CI stated he saw Clark using the Pontiac Ventura to make his deliveries. Defense

produced receipts by a local towing and auto service station.

Significantly, defense counsel produced a receipt from McCaul's auto service station (Defense Exhibit 2) for work done on the car on June 12, 1990. According to the receipt, the car was held at the station until Clark's father paid for the repairs in full on June 16, 1990. Defense Exhibit 2 would contradict the statements regarding observations by the CI 48 hours before Clark's arrest.

The Commonwealth argued that the Affidavit of Probable Cause should be considered without collateral defense exhibits. The CI stated Clark was involved in drug activity, and the Affidavit was corroborated in part by a narcotics officer and other sources, that Clark had driven the car before (N.T. 11/16/90, pp. 28-29).

The Court was persuaded by arguments advanced by defense counsel. The Chester police may have relied on the affidavit in

good faith, but Pennsylvania required independent investigation in addition to reliance on the words of a confidential informant. Commonwealth v. Yerger, 482 A.2d 984 (Pa.Super. 1989).

In the instant case, the Affidavit of Probable cause fails to support the allegations made by the confidential informant with independent police investigation. Accordingly, the Court held that the warrant was illegal and suppressed the evidence seized pursuant to that warrant.

For all the foregoing reasons, the Omnibus Pre-Trial Motion of Defendant, George Howard Clark was granted and evidence seized pursuant to his arrest on June 15, 1990 was suppressed.

BY THE COURT:

_____

Rita E. Prescott, J.

J. A52032/91

COMMONWEALTH OF PENNA., Appellant	:	IN THE SUPERIOR COURT OF PENNA.
VS.	:	
GEORGE HOWARD CLARK	:	NO. 01485 PHILA. 1991

ORDER

The Court hereby denies the application filed January 21, 1992, requesting reargument/ reconsideration of the decision dated January 6, 1992.

PER CURIAM

DATE: March 12, 1992

APPENDIX "C"

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMM. OF PENNA. Respondent	:	NO. 252 E. D. ALLOCATUR DOCKET
VS.	:	1992
	:	
GEORGE CLARK, Petitioner	:	Petition for Allowance of Appeal from the Superior Court

ORDER OF COURT

PER CURIAM

AND NOW, this 13th day of November, 1992, the petition for allowance of appeal from the Superior Court is hereby denied.

A TRUE COPY FROM RECORD
ATTEST: 11/18/92

Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

APPENDIX "D"